No. 81.

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THE TEXAS SCHOOL FUND CASE.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Dec. 12, 1899.

No. 81.

THE HOUSTON AND TEXAS CENTRAL RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS, DEFENDANT IN ERROR.

REPLY ARGUMENT FOR DEFENDANT IN ERROR.

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Of Counsel for Defendant in Error.

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IN THE

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REPLY ARGUMENT FOR DEFENDANT IN ERROR.

The brief of plaintiff in error was not filed until December 1st, and consequently there is not time for more than a short and hurried answer to such points to which it is thought proper to reply.

FIRST.

In my former argument it was shown that the State, ignoring the alleged payments as absolute nullities which need not first be set aside as part of her cause of action, declared on the bonds and for the balance due. When part payment in *valid* warrants was expressly and exhaustively

pleaded by plaintiff in error, the State replied to this defense to the effect, among other grounds, that the warrants were void as bills of credit issued in violation of the Constitution of the United States.

At page 46 of the brief of plaintiff in error it is said: "The first supplemental petition of plaintiff was not a reply to the answer of defendant. In the first place, no reply is required by the statutes of Texas," quoting article 1193 of the Revised Statutes of Texas.

Abandoning this position, it is said at pages 50 and 51 of the brief:

"The evidence afforded by the State's own books was also free from taint; hence, if the State, standing upon its original petition, had offered evidence to show that the warrants used in making the payments were, in form or otherwise, illegal as bills of credit—emitted contrary to the Constitution of the United States—an objection would have lain thereto upon the ground that the fact thus sought to be established had not been pleaded. It was therefore essential to recovery by the State that the right it relied upon under the Federal Constitution to avoid these payments should be pleaded in order to admit proof of the same, and that pleading and proof of the right claimed under the Federal Constitution was as much a part of the State's case as the existence of the indebtedness in the first instance."

Counsel are mistaken in declaring that the "evidence afforded by the State's own books was also free from taint." It is expressly alleged in the answer (Record, p. 17, paragraph 17) that the account on the books of the comptroller's office had been restated so as to exclude payments made in warrants, making the account as declared on in the original petition. It would therefore have been legal to have offered this account in evidence and it would have established the case of the State without affirmatively overthrowing the alleged payments. The transcripts from the books of the comptroller's office introduced by the defendant

(Record, p. 115 *et seq.*) were only skeletons from the books. It has been shown in the former argument, it is submitted, that payment was the affirmative defense of defendant, necessary to have been pleaded and established. Further than this, it was not incumbent upon the State to reply to the plea of payment, though doing so did not militate against this view, for it was *an answer to a defense, and no part of the cause of action*, but the burden was upon the defendant to establish *legal* payment in warrants, and the State, without further pleading than the original petition, could have introduced proof showing, or tending to show, that such legal payment had not been made.

Rev. Stats. Texas, art. 1193.
Meyer *vs.* Opperman, 76 Texas, 108.
R. R. Co. *vs.* Mitchell, 78 Texas, 64.
Morris *vs.* Casling, 79 Texas, 141.

There is a distinction between payment direct, in money, and payment as a conclusion of law from a certain state of facts, such as that relied upon in this case. In the first case a simple plea will suffice, but in the other case the facts constituting payment should be specially alleged, and of course, appropriate rebutting proof may be offered in each case. This distinction was drawn in an early day by the supreme court of Texas:

"I apprehend, however, that if the payment had been direct, in money, at the time stated in the plea, to the legal holder of the note, such fact could have been given in evidence under the plea of payment, as pleaded. If the payment, however, was a conclusion of law from a certain state of facts, then those facts, it seems, should be specially alleged in the plea."

Holliman *vs.* Rogers, 6 Texas, 91.

Necessarily when such facts are specially alleged rebutting proof may be offered under the Texas statute without specially denying or replying thereto. In this case the de-

fendant pleaded the facts constituting payment, and in its answer, as it was bound to do, alleged and undertook to prove that the *warrants were valid.* In paragraph 7 of the answer it is alleged that the State "had then outstanding its *valid obligations* in the form and of the character of warrants drawn by its comptroller on the State treasury for claims and demands against the State," which could not be paid for lack of funds; that then, for the purpose of aiding in maintaining the public credit, the act of December 16, 1863, was passed, and that "under like circumstances and for the same object" the acts of May 28, 1864, and November 15, 1864, were enacted. In paragraph 8 it is alleged that defendant acquired the "so-called treasury warrants," intending to pay and tender to the comptroller in payment of the interest and principal of the special school fund, and by paragraph 9 that they were paid to and accepted by the comptroller.

Record, pp. 9, 10, 11.

These allegations of the validity of the warrants carried with them by necessary implication the validity of the laws under which they were issued, but defendant went beyond this in its answer, as it was proper to do, and asserted and undertook to establish the validity of the laws of 1861, 1863, and 1864 authorizing payment in warrants. In paragraph 11 it is alleged:

"This defendant further says that the said treasury warrants paid by said railway companies, as hereinbefore alleged, on account of the principal and interest due by them respectively, on their said indebtedness to the State of Texas for said school-fund loan, were made by them in good faith and accepted by the said State through its duly authorized officers without objection as valid and lawful payments, and for which said railway companies were entitled and for which they were given credit upon the books of the State of Texas, *in pursuance of valid laws passed by said State in the exercise of its sov-*

ereign power and as then actually in force and observed in Texas."

Record, p. 13.

To the same effect is paragraph 22 of the answer.

Record, p. 20.

The first supplemental petition of the State was consequently but an acceptance of the issue tendered by the company, that the payments were made in valid treasury warrants, issued under valid and binding laws, and necessarily the burden remained upon the company.

SECOND.

Beginning at page 68 of the brief, it is attempted to be shown that this court should construe the alleged contract to accept warrants in payment of this indebtedness. Preliminary to the discussion, it is said at page 70 that "from the beginning of this litigation we have maintained that the obligation of the contracts arising in the manner indicated was impaired by the act of August 13, 1870." As the directly contrary statement is made in my former argument, it is well to understand the record at the outset of what may be said here.

In paragraph 14 of the answer the act of August 13, 1870, is referred to for the first time, and an examination will show (Record, p. 15) that the law is merely described in general terms, and it is not alleged or intimated that it impaired the obligation of any contract. The next place in which this act is alluded to in the answer is in paragraph 17 (Record, p. 17). It is there referred to in connection with the special law of August 15, 1870, and the action of the comptroller in restating the account, but it is not averred directly or indirectly that the restatement of the account was made pursuant to the act of August 13, 1870, or a construction thereof by the comptroller. On the contrary, it is

declared that the comptroller acted "wrongfully and without any authority of law." The only other reference to this act in the answer is in paragraph 23, as follows:

"This defendant further says that by the passage of the acts hereinbefore referred to, and especially by the passage of the act entitled 'An act authorizing the comptroller of the State to receive from the railroad companies in the State the interest that may now be due on their bonds,' approved December 16th, 1863, and an act entitled 'An act amending an act authorizing the comptroller of the State to receive from railroad companies in this State the interest that may now be due or hereafter become due on their bonds,' approved May 28th, 1864, and an act entitled 'An act authorizing railroad companies to discharge their indebtedness to the special school fund with the treasury warrants and bonds and coupons of the State,' approved November 16th, 1864, and an act entitled 'An act for the relief of railroad companies indebted to the State for loans from the special school fund,' *approved August 13th*, 1870, and an act entitled 'An act for the relief of the Houston & Texas Central Railway Company,' passed August 15th, 1870, and by the acceptance of the provisions of said act by said Houston & Texas Central Railway Company and by said Washington County Railroad Company, and especially by accepting the treasury warrants of the State in payment of freight and passenger fares on their respective railroads at par with specie, as required by the aforesaid acts of May 28th, 1864, and November 15th, 1864, *there was created a valid and binding contract by and between the State of Texas, inuring to the benefit of this defendant, as the successor of said companies.*"

Record, p. 21.

In a printed argument filed in this case in the court of civil appeals by the law firm of Baker, Botts, Baker & Lovett, of which R. S. Lovett, of counsel for plaintiff in error, is a member, and who testified on the trial that he had special charge of the case in the State courts (Record, p. 185), it was insisted that the act of August 13, 1870, rati-

fied and approved the payments in question. At pages 93 to 99 it is said:

"The general act entitled 'An act for the relief of railroad companies indebted to the State for loans from the special school fund,' approved August 13th, 1870 (Gen. Laws, Called Ses., 1870, p. 85), under which all subsequent payments have been made, and on which the State, in her petition in this case, relies, clearly recognized the validity of the payments in question. That act required railroad companies indebted to the special school fund to pay on the first day of November, 1870, six months' interest 'on the aggregate amount due on account of said loans, principal and interest, *as said aggregate amount stood on the first day of May, A. D.* 1870,' and in addition one per cent. upon said aggregate amount to be applied toward the sinking fund, etc., and should thereafter pay into the treasury of the State six months' interest and one per cent. on account of the sinking fund, semi-annually, on the first day of May and November in each year. The same provision was contained in section 2 of the special act entitled 'An act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company and to the other special acts relating to said company,' approved July 27th, 1870 (Special Laws, 1870, p. 45). At the time these acts were passed the facts in reference to these payments were fresh in the legislative and public minds. The representatives of the State and the agents of the railway company who conducted the transaction and all the witnesses were then living. They are now dead (Trans., p. 310). It was then known, or could have been ascertained, what kind of warrants were used—whether legal or illegal. If the State had any ground upon which to avoid these payments, if it could avoid them, the facts were known then, and then was the time when the attempt should have been made. Instead of this the legislature passed the acts referred to without the slightest indication of an intention to repudiate these payments or to question them in any way, and considering the conditions then existing, and with all the facts before it, adopted the standing of the accounts on the first day of May, 1870, as the true balance and as the basis for all future payments. It took 'the aggregate amount due on account of said loans, principal and in-

terest, as such aggregate amount stood on the first day of May, A. D. 1870,' as the true amount of the indebtedness. The 'aggregate amount' referred to 'as said aggregate amount stood' on the date named, must have been, it seems to us, beyond question the aggregate amount as it appeared upon the books of this State. There had been various payments from time to time since the loans were made. Some were unquestionably valid, and some were disputed by certain officers of the State. The act was obviously designed as a compromise or settlement as of that date. The standing of the account on the first day of May, 1870, was therefore taken as the basis, and a new arrangement was made by which the debt was to be liquidated in the future. It is unreasonable to suppose that the legislature had reference to the standing of the account elsewhere than as it stood upon the State's books. These books then showed, as appears without dispute, that credit had been duly given for the payments in warrants, and had not then been recharged or canceled on the books." * * *

"It being an indisputable fact that the amount of the indebtedness as it stood on the first day of May, 1870, was the balance due as claimed by appellant, after allowing credit for the payments in warrants, we earnestly insist that the act of August 13th, 1870, above referred to, was an express recognition by the legislature of such payments, and a declaration that they schould not be demanded again, but that the State would accept the balance then existing as the true amount of the indebtedness and as the basis for all future payments required under that act. As said before, the legislature was cognizant of the facts and circumstances attending such payments, and must then have repudiated them if it had intended to do so at all, and the fact that it did not in any way question them, but adopted a basis including them, seems to us to admit of no doubt that the legislature recognized their validity and intended by taking the basis stated to waive all question respecting them in the future. We think, moreover, that the fact that the legislature took the standing of the account on May 1st instead of on the date of the passage of the act is very significant as indicative of such intent. The disposition of certain State officers with reference to these payments was, of course, known to the legisla-

ture. It was doubtless considered by the legislature that if any later or uncertain date should be taken these officers would recharge these items, or take some action with reference to the account that would defeat the purpose, or that probably an effort had already been made, subsequent to May 1st, to recharge the items. Therefore, the legislature, looking to the accounts as they stood on the 1st day of May, adopted them as of that date so as to prevent the comptroller or other officer from defeating the will and purpose of the legislature to recognize these payments."

It is clear, therefore, that the basis of the argument of plaintiff in error is unsound, for instead of impairing the obligation of the contract, this act is alleged to be an element of the contract. And the argument is itself unsupported by authority. The Constitution of the United States declares that "no State shall * * * pass any * * * law impairing the obligation of contracts." As an original proposition, to give this court jurisdiction upon the ground that a Federal question is involved under this clause of the Constitution some law of the State must be passed impairing the obligation of the contract, and necessarily the contract must be an existing one and the law must be enacted *subsequent* thereto; and under section 709 effect must be given to the subsequent law by the State court by a decision in favor of its validity. The only law, statutory or constitutional, which counsel urge as impairing the obligation of the contract in this case, in their brief (pp. 249, 250), is the act of August 13, 1870. We have seen, however, that by the answer it is insisted that this was part of the contract and therefore did not impair its obligation. It also appears from the opinion of the court of civil appeals that the decision was not in favor of the validity of this statute of 1870. On the other hand, in so far as any decision upon it was made, it was *against* its validity, as confirming and ratifying the payments. But pursuing the

argument that this court will not pass upon the contract unless the decision of the State court gave effect to this subsequent law, the proposition is thoroughly supported by the decisions. Many cases are cited in the brief as holding the contrary, but an examination of them will show, whatever the language employed, that the *decisions* accord with this rule. If, however, any of them are not in harmony with our contention, they are controlled by the later cases. The case of *Bacon vs. Texas*, 163 U. S., 207, cited in my former argument, where the rule was distinctly stated, has been approved or the principle re-announced in the following cases:

Douglas *vs.* Kentucky, 168 U. S., 502.
R. R. Co. *vs.* Nebraska, 170 U. S., 68.
Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 9.
McCullough *vs.* Virginia, 172 U. S., 116, 122.
Water Power Co. *vs.* Street Railway Co., 172 U. S., 485, 486.
Turner *vs.* County Commissioners, 173 U. S., 463.

THIRD.

In stating the alleged contract, it is said at page 88 of the brief:

"Upon an accumulation from time to time of State warrants received by them, the railroad companies paid and delivered them to the comptroller of the State of Texas on account of the interest due upon the school-fund loans."

Taken in connection with what precedes it, this is a statement that the companies received the warrants at par with specie for freight and passage upon their lines and paid the same warrants to the comptroller on their indebtedness. This is an entirely erroneous statement. It is alleged in paragraph 8 of the answer that the companies "acquired for valuable and adequate considerations the so-

called treasury warrants," and in paragraph 9 "that having acquired the same for a valuable consideration, as hereinbefore recited," said companies paid warrants to the comptroller. The same general allegation of acquisition of said warrants for valuable considerations appears elsewhere in the answer, and it is averred that warrants were received at par for freight and passage, but it is nowhere alleged in direct terms that the warrants so received for freight and passage were those paid to the comptroller.

Record, pp. 10, 11, 12.

It was not until the passage of the act of May 28, 1864, that railway companies were required to receive treasury warrants at par for freight and passage over their lines, in order to authorize payment of their indebtedness to the school fund in warrants, and the sum of $49,146.68 was paid *in warrants prior to the passage of this act.*

Record, pp. 11, 116.

There was not a syllable of testimony showing that any warrants received for freight and passage at par were paid on this indebtedness.

With reference to the contention, beginning at page 113 of the brief, that there was no evidence showing whether the warrants used in making payments were issued before or during the war, the court of civil appeals found as a fact (Record, p. 214) that they were issued *after* they were intended to circulate as money, and all of them were void, whether issued for civil or military purposes.

FOURTH.

It is insisted in the brief, beginning at page 198, that the act of August 13, 1870, impaired the obligation of the alleged contract between the State and the companies arising under the acts of 1861, 1863, and 1864. In the second para-

graph of this argument it has been shown (1) that the company, in its answer, alleged that this law was part of its contract, and its validity therefore was not drawn in question, and (2) that the court of civil appeals did not, in its decision, give effect thereto, but in the only phase in which it was considered, to wit, as confirming the contract, the decision was against its validity. Counsel for plaintiff in error, both in the brief and argument, in order to present a case within the jurisdiction of this court, run counter to their pleadings on this subject. The particulars in which this is done in the brief have been pointed out. In his printed argument, at page 14, Mr. Carlisle, referring to the act of August 13, 1870, says:

"The purpose of the legislature in requiring the amount of the debt and interest to be ascertained according to the accounts as they stood on the first day of May, 1870, was to ratify the cancellation of the credits which had been made by the officials on or prior to that date."

This is not only at variance with the pleadings as heretofore pointed out, but also in the particular that it is expressly alleged in the answer (Record, p. 17) that this restatement of the account and cancellation of credits occurred November 1, 1870, after the passage of the act; so, according to their own case, no such purpose could have actuated the legislature. The record does not show that in restating the account the comptroller acted upon the law of 1870; but if such were the case, and other essentials appeared, this court would still be without jurisdiction, because it is the effect given by the highest court of the State, and not executive officers, which will be regarded in this action.

FIFTH.

There are several minor suggestions which appear at various places in the brief deserving of notice. It is intimated that when the facts were fresh in mind and the actors in the transaction were living the State should have proceeded. I have shown that, commencing with the constitutional convention of 1866, these payments have been consistently and continuously disavowed, except in one instance. The companies, granted favors and extensions by the acts of November 10, 1866, and August 13, 1870, because of the paralysis of business, have regularly paid the sums demanded by the State under those laws, and no cause of action accrued until 1894, upon which this suit was promptly instituted. Whatever delay has occurred the companies are responsible for. It is not true, as charged in the answer, that they were forced into accepting the acts of 1866 and 1870 by threats of the Governor, and have continued in coercion since then because of intimidation of his successors. Proof of this was challenged on the trial, and there is not a line to question the contrary finding of the trial judge.

Record, pp. 69, 71.

Nor is this a case where the companies were driven to the use of paper currency by revolutionary and irresistible forces. It was optional with them, the use of the warrants was voluntary, and for a double reason, in the language of this court, "those who aid in such transactions must do so at their peril."

CHARLES A. CULBERSON,
Of Counsel for Defendant in Error.

NOTE.—What is said in this and the former argument in reference to the act of August 13, 1870, applies also in cause

No. 82. The allegations of the answer and the argument in the court of civil appeals with regard to this law and the impairment of the contract were the same in the two cases. The provisions of the special act of July 27, 1870, applicable only in No. 82, are the same as the act of August 13, 1870, in so far as the account of the indebtedness is concerned.